HOUSE ARMED SERVICES COMMITTEE
DUNCAN HUNTER, CALIFORNIA – CHAIRMAN

PRESS RELEASE

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Hunter Floor Statement on the Military Commissions Act

Washington, D.C. – U.S. House Armed Services Committee Chairman Duncan Hunter (R-CA) today provided the full House of Representatives a detailed description of the Military Commissions Act of 2006, which creates a new judicial system to try terrorists captured in the Global War on Terrorism. While protecting American troops and intelligence agents, the Military Commissions Act grants accused terrorists numerous rights to ensure basic fairness and allow them to mount a full defense.

Hunter's floor statement follows:

I can think of no better way to honor the fifth anniversary of September 11th than by establishing a system to prosecute the terrorists who, on that day, murdered thousands of innocent civilians, and who continue to seek to kill Americans both on and off the battlefield.

This is vital legislation important to the national security of the United States. Our foremost consideration in writing this legislation is to protect American troops and American citizens from harm. The war against terror has produced a new type of battlefield and a new type of enemy. How is it different? We are fighting a ruthless enemy who does not wear a uniform—a savage enemy who kills civilians, women and children and then boasts about it. A barbaric enemy who beheads innocent civilians by sawing their heads off. An uncivilized enemy who does not acknowledge or respect the laws of war, the Geneva Conventions or any of the guarantees which are recognized by civilized nations.

Justice Thomas put it best in the *Hamdan* decision. He said we are "not engaged in a traditional battle with a nation-state, but with a world-wide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilians workers, and has tortured and dismembered captured American soldiers."

How is the battlefield new? First, it will be a long war. We don't know if this enemy will be defeated this decade, the next decade, or even longer than that. Second, in this new war, where intelligence is more vital than ever, we want to interrogate the enemy. Not to degrade them, but to save the lives of Americans troops, American civilians, and our allies. But it is not practical on the battlefield to read the enemy their Miranda warnings. On the battlefield we can't have battalions of lawyers. Finally, this is an

ongoing conflict and sharing sensitive intelligence sources, methods and other classified information with terrorist detainees could be highly dangerous to national security. I am not prepared to take that risk.

So what we have done is to develop a military commission process that will allow for the effective prosecution of enemy combatants during this ongoing conflict. Without this action, United States has no effective means to try and punish the perpetrators of September 11th, the attack on the U.S.S. Cole and the embassy bombings.

We provide basic fairness in our prosecutions, but we also preserve the ability of our warfighters to operate effectively on the battlefield. I think a fair process has two guiding principles. First, the government must be able to present its case fully and without compromising its intelligence sources or compromising military necessity. Second, the prosecutorial process must be done fairly, swiftly and conclusively.

Who are we dealing with in military commissions? We are dealing with the enemy in war, not defendants in our domestic criminal justice system. Some of them have returned to the battlefield after we let them out of Guantanamo. Our primary purpose is to keep them off the battlefield. In doing so we treat them humanely and if we choose to try them as war criminals we will give them due process rights that the world will respect. But we have to remember they are the enemy in an ongoing war.

In time of war it is not practical to apply to rules of evidence that we do in civilian trials or court-martials for our troops. Commanders and witnesses can't be called from the frontline to testify in a military commission. We need to accommodate rules of evidence, chain of custody and authentication to fit the exigencies of the battlefield. If hearsay is reliable we should use it. If sworn affidavits are reliable, we should use them. I note that the rules of evidence are relaxed in international war crime tribunals for Rwanda and Yugoslavia.

The Supreme Court has suggested that Congress act here to fill the legal void left by the ***Hamdan*** decision, but in doing so let's not forget our purpose is to defend the nation against the enemy. We won't lower our standards, we will always treat detainees humanely, but we can't be naive either.

This war started in 1996 with the al Qaeda declaration of jihad against the United States. The Geneva Conventions were written in 1949 and the UCMJ was adopted in 1951. These documents were not written to address the war we are now fighting. In that sense, what we are required to do after ***Hamdan*** is broader than war crimes trials, it is the start of a new legal analysis for the long war. It is time for us to think about war crime trials and a process that provides due process and protects national security in the new war.

So what do we do with these new military commissions? We uphold basic human rights and state what our compliance with this standard means for the treatment of detainees. We do this in a way that is fair and the world will acknowledge as fair. First, we provide accused war criminals at least 26 rights if they are tried by a commission for a war crime. We also provide the following rights:

- Right to Counsel, provided by government at trial and throughout appellate proceedings;
- Impartial judge;
- Presumption of innocence;
- Standard of proof beyond a reasonable doubt;

- The right to be informed of the charges against him as soon as practicable;
- The right to service of charges sufficiently in advance of trial to prepare a defense;
- The right to reasonable continuances;
- Right to peremptory challenge against members of the commission and challenges for cause against members of the commission and the military judge ;
- Witness must testify under oath; judges, counsel and members of military commission must take oath;
- Right to enter a plea of not guilty;
- The right to obtain witnesses and other evidence;
- The right to exculpatory evidence as soon a practicable;
- The right to be present at court with the exception of certain classified evidence involving national security, preservation of safety or preventing disruption of proceedings;
- The right to a public trial except for national security issues or physical safety issues;
- The right to have any findings or sentences announced as soon as determined;
- Right against compulsory self-incrimination;
- Right against double jeopardy;
- The defense of lack of mental responsibility;
- Voting by members of the military commission by secret written ballot;
- Prohibitions against unlawful command influence toward members of the commission, counsel or military judges;
- Two-thirds vote of members required for conviction; Three-fourths vote required for sentences of life or over ten years; unanimous verdict required for death penalty;
- Verbatim authenticated record of trial;
- Cruel or unusual punishments prohibited;
- Treatment and discipline during confinement the same as afford to prisoners in U.S. domestic courts;
- Right to review of full factual record by convening authority; and

- Right to at least two appeals including to a federal Article III appellate court.

We provide all of these rights, and we give them an independent judge, and the right to at least two appeals, including the U.S. Court of Appeals for the District of Columbia and access to the Supreme Court. No one can say this is not a fair system.

I know some of my colleagues are concerned about the issue of reciprocity. I ask them to look at the list of rights I just summarized. And also keep in mind, that these are rights for terrorists. If we are talking about true reciprocity, then we are only concerned about how the enemy will treat American terrorists. These are not our rules for POWs. We treat the legitimate enemy differently and expect them to treat our troops the same.

How do we try the enemy for war crimes? In this Act, Congress authorizes the establishment of military commissions for alien unlawful enemy combatants, which is the legal term we use to define international terrorists and those who aid and support them, in a new separate chapter of Title 10 of the USC Code, Chapter 47A. While this new chapter is based upon the Uniform Code of Military Justice, it creates an entirely new structure for these trials.

In this bill we provide standards for the admission of evidence, including hearsay evidence and other statements that are adapted to military exigencies and provide the military judge the necessary discretion to determine if the evidence is reliable and probative.

I want to talk a little bit about how we handle classified evidence. We had three hearings on this bill in addition to briefings and meetings with experts. I asked every witness the same question. If we have an informant, either a CIA agent or an undercover witness of some sort, are we going to tell Khalid Sheik Mohammad (KSM) who the informant is? This legislation does not allow KSM to learn the identity of the informant. After several twists and turns in the road, after meeting with the Senate and the White House in marathon sessions over the weekend, we have crafted a solution that does not allow the KSM to learn the identify of the informant, yet provides a fair trial. How do we do this? We address this in Section 949d(f) of Section 3. Classified evidence is protected and is privileged from disclosure to the jury and the accused if disclosure would be detrimental to national security. The accused is permitted to be present at all phases of the trial and no evidence is presented to the jury that is not also provided to the accused.

Section 949d(f) makes a clear statement that sources, methods, or activities will be protected and privileged and not shown to the accused, however, the substantive findings of the sources, methods, or activities will be admissible in an unclassified form. This allows the prosecution to present its best case while protecting classified information. In order to do this the military judge questions the informant outside the presence of the jury and the defendant. In order to give the jury and the defendant a redacted version of the informant's statement, the just must find: 1) that the sources, methods, or activities by which the US acquired the evidence are classified and 2) the evidence is reliable. Once the judge stamps the informant as reliable, the informant's redacted statement is given to both the jury and the accused. It removes the confrontation issue, yet allows the accused to see the substance of the evidence against him. I think these rules protect classified evidence and yet preserve a fair trial.

One other point I want to make for the record. As I mentioned earlier, we have modified the rules of evidence to adapt to the battlefield. One of the principles used by the judiciary in criminal prosecutions of our citizens is called the "fruit of the poisonous tree doctrine." The rule provides that evidence derived from information acquired by police officials or the government through unlawful means is not

admissible in a criminal prosecution. I want to make it clear that it is our intent with the legislation not to have this doctrine apply to evidence in military commissions. While evidence obtained improperly will not be used directly against an accused, we will not limit the use of any evidence derived from such evidence. The deterrent effect of the exclusionary rule is not something that our soldiers consider when they are fighting a war. The theory of the exclusionary rule is that if the constable blunders, the accused will not suffer.

However, we are not going to say that if the soldier blunders, we are not going to punish a savage terrorist. Some rights are reserved for our citizens. Some rights are reserved for civilized people.

Mr. Speaker, this is a complicated piece of legislation. In addition to establishing an entire legal process from start to finish, we address the application of common Article 3 of the Geneva conventions to our current laws. Section 5 clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts.

Section 6 of the bill amends 18 USC Section 2441, the War Crimes Act to criminalize grave breaches of common Article 3 of the Geneva Conventions. As amended, the War Crimes Act will fully satisfy our treaty obligations under common Article 3. This amendment is necessary because currently Section (c)(3) of the War Crimes Act defines a war crime as any conduct which constitutes a violation of Common Article 3. Common Article 3 prohibits some actions that are universally condemned, such as murder and torture but also prohibits "outrages upon personal dignity" and "humiliating and degrading treatment," phrases which are vague and do not provide adequate guidance to our personnel. Since violation of Common Article 3 is a felony under the War Crimes Act, it is necessary to amend it to provide clarity and certainty to the interpretation of this statute. The surest way to achieve that clarity and certainty is to define a list of specific offenses that constitute war crimes punishable as grave violations of Common Article 3. This is something we need now, because of the Hamdan decision.

Section 6 of the bill also provides that any detainee under the custody or physical control of the United States will not be subject to "cruel, inhuman or degrading treatment or punishment" prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution, as defined by the U.S. reservations to the UN Convention against Torture. This defines our obligations under Common Article 3 by reference to the U.S. constitutional standard adopted by the Detainee Treatment Act of 2005.

Section 7 of the bill addresses the question of judicial review of claims by detainees by amending 28 USC Section 2241 to clarify the intent of the Detainee Treatment Act of 2005 to limit the right of detainees to challenge their detention. The practical effect of this amendment will be to eliminate the hundreds of detainee lawsuits that are pending in courts throughout the country and to consolidate all detainee treatment cases in the D.C. Circuit. However, I want to stress that under this provision detainees will retain their opportunity to file legitimate challenges to their status and to challenge convictions by military commissions. Every detainee under confinement in Guantanamo Bay will have their detention reviewed by the U.S. Court of Appeals for the District of Columbia.

Mr. Sensenbrenner and my other colleagues are going to speak on the rest of the bill, but before I finish I want to make one point very clear. This legislation does not condone or authorize torture in any way. In fact, we make it a war crime, punishable by death, for one of our soldiers or interrogators to torture someone to death. Let me emphasize this again. In Section 6 of this bill, we amend 18 USC 2441, the War Crimes Act. In this amendment we explicitly provide that torture inflicted upon a person in custody for the purpose of obtaining information is a war crime for which we may prosecute one of our own

citizens. While most of this legislation deals with how we handle the enemy, I want to make it crystal clear that nothing in what we are doing condones or allows torture in any way.

I believe that this legislation is the best way to prosecute enemy terrorists and to protect U.S. government personnel and service members who are fighting them.

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